IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 21 of 2004

WITH

CIVIL APPLICATION No 560 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SOMNATH TRUST

Versus

JAMNADAS MADHAVJI INTERNATIONAL LTD.

Appearance:

1. Appeal from Order No. 21 of 2004

MR SURESH M SHAH for Petitioner No. 1-2/7

MR MEHUL S SHAH for Petitioner No. 1-2/7

MR MIHIR JOSHI WITH MR ANSHIN H DESAI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 12/03/2004

ORAL JUDGEMENT

This Appeal From Order is filed by the appellant - Trust, namely, Somnath Trust against the order passed by the learned Civil Judge (S.D.), Veraval below an application Exh. 5 in Special Civil Suit No. 135 of 2003 whereby the present appellant - original defendant No.1 was restrained from dispossessing the present respondent from the suit leased land and was also restrained from disturbing the possession in respect of the said land till the final disposal of the suit. The learned Trial Judge has also directed to remove the Notice Board installed on the boundary of the suit land within 30 days of the said order and directed the appellant to pass pursis to that effect and if the said Notice Board is not removed as directed within the period, the present appellant was permitted to remove the said notice board at the cost of the appellant.

2. It is the case of the appellant that a Partnership Firm, namely, Jamnadas Madhavji & Company was granted by the appellant - Trust, Sub-lease of the land admeasuring about 8903 Sq. Mts. from Survey No. 1791 of Prabhaspatan, Veraval from 04.11.1977 from amongst various lands granted to the appellant Trust by the Govt. for 999 years. A Regd. Sub-lease Deed was executed on 14.02.1986 wherein various terms and conditions were set out. On 02.06.2003, the appellant Trust, after putting warning notice on the land and placing guard over it, had given notice to the Power of Attorney Holder of the sub-lessee Jamnadas Madhavji & Company, pointing out that the terms and conditions of the sub-lease were violated by the sub-lessee and called upon him to show cause as to why the sub-lease should not be terminated. The sub-lessee has given reply to the said notice on 09.06.2003 admitting the fact regarding non-payment of rent and also submitting that there could be no objection to the statement made in the warning notice and further requesting to remove the guard which was placed by the appellant - Trust.

3. It is further stated that the appellant - Trust thereafter gave Regd. notice dated 15.09.2003 to the Power of Attorney Holder of the sub-lessee terminating the sub-lease and canceling it for breach of conditions of sub-lease and informed that sub-lessee has no right whatsoever on the said land. The sub-lessee, thereafter served a telegram dated 20.09.2003 in response to the notice issued by the appellant - Trust. A letter was issued by the appellant - Trust on 26.09.2003 and on 28.09.2003 wherein it was stated that the possession of

the disputed land was with the appellant - Trust and no disturbance of any one would be allowed in the said land. Despite this fact, the present respondent has filed Special Civil Suit No. 135 of 2003 before the Court of Civil Judge (S.D.), Veraval and obtained the order of injunction against the appellant - Trust.

4. It is this order dated 31.12.2003 which is under challenge in the present Appeal From order.

5. Mr. S.M. Shah, learned advocate appearing for the appellant - Trust has raised several contentions challenging the impugned order. Firstly, he has submitted that the suit filed by the present respondent is not maintainable as the present respondent does not have any title so far as the disputed land is concerned. He has further submitted that there was no privity of contract between the appellant - Trust and the present respondent as the deed of sub-lease was not executed in favour of the present respondent. The sub-lease dated 11.02.1986 was between the appellant and the firm of M/s. Jamnadas Madhavji & Company and the name of the present respondent, namely, Jamnadas Madhavji International Limited did not figure anywhere in the said deed of sub-lease. Mr. Shah has taken the Court through various letters and documents produced before the Trial Court and pointed out that the present respondent has no right whatsoever to claim any relief before the Trial Court in the suit filed against the appellant - Trust. Mr. Shah has further submitted that the appellant - Trust has already taken over the possession of the disputed land prior to the filing of the suit and that fact was admitted and hence, there was no question of granting any relief against the appellant to the effect that the appellant was to be restrained from dispossessing the present respondent from the suit land. Mr. Shah has further submitted that the learned Trial Judge has exceeded his jurisdiction in granting the relief which was not prayed for in the suit as there was no relief to the effect that notice board placed by the appellant on the disputed land was required to be removed and yet the said relief was granted by the Trial Judge while deciding the application Exh. 5.

6. Mr. Shah has further submitted that present respondent cannot be said to be in possession of the disputed land and hence, there is no question of dispossessing the respondent from the disputed land. Even the present respondent cannot remotely be construed to be in settled possession of the disputed land as the settled possession must be effective, undisturbed and to

the knowledge of the owner or without any attempt at concealment by the tress-passer. In support of his submission, he relied on the decision of the Hon'ble Supreme Court in the case of RAME GOWDA (DEAD) BY LRS. V/S. M. VARADAPPA NAIDU (DEAD) BY LRS. AND ANOTHER, (2004) 1 S.C.C. 769 wherein it is held that "The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may reenter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possessiion which has never been lost. The Hon'ble Supreme Court has also laid down certain tests which may be adopted as a working rule for determining the attributes of "settled possession". This rules are :-

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop.

On the basis of the above observations of the Hon'ble Supreme Court, Mr. Shah has submitted that none of these criterias have been fulfilled in the case of the present respondent and hence, it cannot said that the respondent was in settled possession of the disputed land. The learned Trial Judge has wrongly granted injunction against the appellant. He has, therefore,

submitted that the impugned order passed by the learned Trial Judge is contrary to the facts and evidence on record and against the settled propositions of law. He, therefore, submitted that the impugned order is required to be quashed and set aside.

7. Mr. Mihir Joshi with Mr. Anshin H. Desai, learned advocates appearing for the respondent submitted that none of the grounds raised by Mr. Shah challenging the impugned order passed by the learned Trial Judge is tenable. He has submitted that present respondent is the successor in interest and it has been explained in the plaint itself that originally there was a firm of M/s. Jamnadas Madhavji & Company and the said firm was converted into a public limited Company, namely, Jamnadas Madhavji International Co. Ltd. and this Company has taken over the entire assets and liabilities of the predecessor firm and hence, there is nothing wrong in pursuing the legal remedy by the present respondent. The record itself shows that the alleged possession stated to have been taken on 14.09.2003 and that too was for a different purpose. It was specifically stated that only with a view to avoid encroachment, a guard was required to be posted and for that purpose, the possession was required. There was no reference that for breach of condition, the said possession was taken. Even in the Caveat filed before the Trial Court, it was not mentioned to that effect. Mr. Joshi has further submitted that after appreciation of evidence, the learned Trial Judge has held that there was nothing on record to show that possession was in fact taken by the appellant. The present respondent was successor in interest and representing the original firm and this fact was well within the knowledge of the present appellant right from 1996 onwards and several correspondence were exchanged between the appellant and the respondent and the appellant was aware about this fact. Hence, it is not open for the appellant to urge before this Court that the present respondent is not the sub-lessee of the disputed land.

8. Mr. Joshi has further submitted that even if it is assumed that the present appellant has taken over the possession, the said action of taking over possession is not valid or legal in the eye of law and that cannot be protected. In this connection, he relied on the decision of the Hon'ble Supreme Court in the case of LALLU YESHWANT SINGH (DEAD) BY HIS LEGAL REPRESENTATIVE V/S. RAO JAGDISH SINGH AND OTHERS, AIR 1968 S.C. 620 wherein it is held that "whenever there are arrears of land revenue, the landlord cannot take possession forcibly but

has to take action for dispossession under Section 137. Section 163 cannot be interpreted to mean that in a proceeding under that section it is not sufficient to determine the question of de facto possession alone but it is also necessary to enquire as to whether this possession is or is not wrongful. It is further held that the word "trespass" in Section 326 would include forcible entry and dispossession by the landlord. A landlord does commit trespass when he forcibly enters on land in the possession of a tenant whose tenancy has expired."

9. He has further relied on the decision of the Hon'ble Supreme Court in the case of S.R. EJAZ V/S. T.N. HANDLOOM WEAVERS COOPERATIVE SOCIETY LIMITED, (2002) 3 S.C.C. 137 wherein it is held that "If such actions by the mighty or powerful are condoned in a democratic country, nobody would be safe nor can the citizens protect their properties. Law frowns upon such conduct. The court accords legitimacy and legality only to possession taken in due course of law. If such actions are condoned, the fundamental rights guaranteed under the Constitution of India or the legal rights would be given a go-by either by the authority or by rich and influential persons or by musclemen. Law of jungle will prevail and "might would be right" instead of "right being might".

10. He has further relied on the decision of the Hon'ble Supreme Court in the case of SAMIR SOBHAN SANYAL V/S. TRACKS TRADE PRIVATE LTD. AND OTHERS, (1996) 4 S.C.C. 144 wherein it is held that "high-handed action taken by respondents 1,3 and 6 in having the appellant dispossessed without due process of law, cannot be overlooked or condoned. The court cannot blink at their unlawful conduct to dispossess the appellant from the demised property and would say that the status quo be maintained. If the court gives acceptance to such high-handed action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law for ransom and it would be a field day for anarchy. Due process of law would be put to ridicule in the estimate of the law-abiding citizens and rule of law would remain a mortuary."

11. Mr. Joshi has further submitted that even on the ground of non-payment of rent though a token rent of Rs. 1/- per month is not paid, the possession cannot be straightway taken by the appellant as it is contrary to the provisions contained in Section 114 of the Transfer of Property Act. Section 114 of the Transfer of Property

Act deals with relief against for forfeiture for non-payment of rent. It reads as under :-

" 114. Relief against forfeiture for non-payment of rent.

Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

12. It is clear from the above section that even if there is a condition in the lease deed that for non-payment of lease, the lease-hold is entitled to take possession from the lessee. However, for that purpose, the lessor has to approach the competent Court for removing the lessee from the suit property and if at the time of hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear together with interest thereon, or furnish security to that effect, the Court would consider the said action on the part of the lessee as compliance of the requirement of payment of rent and instead of making a decree for ejectment, the Court would pass order relieving the lessee against the forfeiture. In this view of the matter, the appellant is not entitled to take possession of the disputed land for the alleged breach of condition of non-payment of the rent in question.

13. In the above view of the matter and on the basis of the authorities relied upon by him, Mr. Joshi has strongly contended that the learned Trial Judge has at length discussed all the contentions raised before him and after considering the facts and circumstances of the case and appreciating the evidence produced before him, he has come to a correct decision and the said decision may not be interfered with by this Court while exercising powers under O. 43, R. 1 of C.P.C.

14. From the foregoing facts and submissions made by the learned advocates appearing for the respective parties, it appears to the Court that the suit land

bearing Survey No. 1791, admeasuring about 8903 Sq. Mts. was given to the original sub-lessee, namely, Jamnadas Madhavji & Company on lease by a Regd. Sub-lease Deed dated 14.02.1986 for the period of 99 years. The sub-lessee has paid Rs. 80,030/- to the appellant - Trust by way of premium and the lease rent was determined at Rs. 1/- p.a. The land was given to the sub-lessee for industrial purposes and even while giving the said land on lease to the sub-lessee, prior permissions of the State Government as well as Charity Commissioner were obtained as originally the land was given by the State Government to the appellant - Trust. The lease deed contains various terms and conditions and one of such terms and condition was that in the event of a breach of condition of the lease deed, the lessor is entitled to cancel the lease deed. It is also borne out from the facts that industrial use of the land in question was not permissible and hence, the sub-lessee had made a request for change of use. Such request was made vide letters dated 05.02.1996, 18.04.1996 & 18.06.1999. In pursuance of such request, the matter was under consideration of the appellant - Trust and on the basis of the Architect's report and after having considered the market value of the land in question, an amount of about Rs. 90,00,000/- was demanded from the sub-lessee by way of premium, for granting permission to change the use of the land in question. It however, appears that no final decision was taken in this regard.

15. The real dispute appears to have been started by virtue of issuance of notice dated 02.06.2003 whereby the appellant - Trust has alleged that the original sub-lessee has violated the terms and conditions of the Lease Agreement. It was also alleged that condition Nos.1 & 11 were violated as the original sub-lessee has not paid the rent as agreed between the parties and the original sub-lessee has also violated the condition with regard to starting of industry on the disputed land. A detailed reply was given by the respondent to the said notice dated 02.06.2003. It appears also from the record that in between possession was said to be taken on 14.09.2003. However, this fact was not believed by the Trial Court. The notice of termination of Lease Deed was issued on 15.09.2003 which was challenged by way of filing a suit before the Trial Court.

16. Mr. S.M. Shah, learned advocate appearing for the appellant mainly confines his argument on the issue that the present respondent, namely, M/s. Jamnadas Madhavji International Limited has no locus to file the suit nor the said Company can claim any possession on the

disputed land or any protection against the dispossession as the appellant - Trust has not executed any Lease Deed in favour of the said Company. The appellant - Trust has not issued any notice to the Company and reply to notice was not given by the said Company. The reply to the notice was given by the original sub-lessee. Mr. Shah has also emphasized on the fact that the Firm has admitted in its reply dated 09.06.2003 that the rent was in arrears and the facts of placing the notice board and keeping the security guard were also not disputed by the firm. On this basis, Mr. Shah has contended that the learned Trial Judge was not justified in granting interim injunction against the possession or directing to remove Notice Board.

17. If one examines the above arguments of Mr. Shah in light of the documents produced and pleadings made, this Court is of the prima facie view that the firm of M/s. Jamnadas Madhavji & Company was converted into the Company, namely, Jamnadas Madhavji International Limited. A certificate of Incorporation was issued by the Registrar of Companies on 28.08.1992. In the Memorandum of Association itself, it was made clear that the parties have been carrying on business under the name and style of M/s. Jamnadas Madhavji & Company under a Deed of Partnership and the said Partnership having been duly registered under the Provisions of Indian Partnership Act with the Registrar of Firms and the members of the said Partnership, for the sake of smooth and effective management of improvement have agreed to form a joint stock Company as defined under Section 566 of the Companies Act, 1956. It is also stated in Clause (1)(c) of Articles of Association that the Company shall undertake, pay, observe, satisfy, perform and fulfill the agreement and liabilities of the parties hereto or the firm of M/s. Jamnadas Madhavji & Company entered into or incurred in their separate or joint names or in the name of the firm in relation to the said business and assets brought in as aforesaid and shall indemnify them respectively from and against all actions, proceedings, damages, claims and demands in respects thereof. These clauses in the Memorandum of Association as well as Articles of Association, prima facie, leads to believe that by operation of law, the Company becomes the successor in interest of the firm and undertakes all its assets and liabilities which, inter alia, includes the Lease Agreement entered into between the firm of M/s. Jamnadas Madhavji & Company on the one hand as the appellant - Trust on the other hand.

18. As far as the possession is concerned, the

learned Trial Judge has discussed at length and did not believe the possession of the appellant over the land in question. Even otherwise, notice dated 15.09.2003 issued by the appellant did not indicate that the possession was taken over by the appellant - Trust. The notice board which was placed on the disputed land talks of only the ownership and there was no reference with regard to possession. Even the Caveat application filed by the appellant - Trust before the Trial Court on 17.09.2003, did not contain any averment with regard to the possession having been taken by the appellant - Trust. This Court is, therefore, in conformity with the view expressed by the Trial Court that the whole story with regard to taking over possession is nothing but an afterthought.

19. Even if it is assumed that the possession has been taken over by the appellant - Trust, various authorities cited by Mr. Mihir Joshi and referred to hereinabove clearly hold that such possession is not a valid and legal possession and it is to be considered as the possession of a trespasser even if such person may be the owner of the land. The authority relied upon by Mr. Shah on the issue of settled possession, does not render any assistance to the appellant - Trust as in the present case, it is the firm which is ultimately converted into a joint stock Company and the present respondent is the successor in interest and certainly be considered as in possession of the suit land right from 1996, the date on which the Lease Agreement was entered into.

20. Considering the above facts and circumstances of the case and the authorities referred to hereinabove, I am of the view that the learned Trial Judge has not committed any error while granting the interim injunction against the appellant - Trust. The Court, therefore, is not inclined to interfere in the order passed by the learned Trial Judge and the Appeal From Order is, therefore, dismissed. Notice discharged without any order as to costs.

21. Before parting, it is, however, observed that the learned Trial Judge may decide and dispose of the suit as expeditiously as possible, preferably within the period of 12 months from the date of receipt of writ from this Court or from the date of receipt of certified copy of this order, whichever is earlier. It is also clarified that the observations made here in this order are prima facie observations and the learned Trial Judge may not be influenced by his own order passed below application Exh. 5 as well as by this Court, while deciding the suit.

22. In view of the order passed in main matter, there shall be no order in Civil Application No. 560 of 2004.

Sd/-

[K.A. PUJ, J.]

#Savariya#

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